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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 795

EDWARD FRETWELL PRICHARD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 502-510) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1950 (R. 501). The petition for a writ of certiorari was filed on May 4, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether it was error to receive in evidence petitioner's admission of complicity in the election fraud on the ground that it was a confidential communication between client and attorney and hence privileged.

2. Whether the acquittal of petitioner's sole co-defendant necessitates the setting aside of petitioner's conviction of conspiracy to stuff ballot boxes.

3. Whether the instructions were deficient in failing to make it clear to the jury that, in order to convict one defendant and acquit the other, they must find that the convicted defendant conspired with another person or persons not indicted.

4. Whether a conspiracy to place forged votes in a ballot box at a Congressional election is a violation of 18 U. S. C. 241.

STATUTE INVOLVED

18 U. S. C. 241 provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, * * *
>
> * * * * *
>
> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

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STATEMENT

A single-count indictment (R. 1-6) filed on April 15, 1949, in the District Court for the Eastern District of Kentucky charged petitioner and a codefendant named Alvarado Erwin Funk, Jr., with having conspired "with each other and with others whose names are to the Grand Jurors unknown" to injure and oppress divers citizens of the United States in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States, in violation of 18 U. S. C. 241, *supra*. The citizens whose rights the defendants were charged with having conspired to infringe were the qualified voters of eleven precincts of Bourbon County, Kentucky, and particularly those voters who voted for the Republican candidates for the offices of President, United States Senator, and Congressman from the Sixth Congressional District of Kentucky at the general election held on November 2, 1948 (R. 1-2, 4). The rights and privileges of these citizens which the defendants were charged with having conspired to violate were the rights and privileges to cast lawful ballots for the candidates of their choice and to have their votes honestly preserved, returned, and recorded, unimpaired and undiluted by "fictitious ballots falsely cast" for opposing candidates (R. 2-3, 4). Specifically, it was charged that the defendants conspired to stuff the ballot boxes in the eleven precincts in question with fraudulent votes

for the Democratic candidates for the above-named offices by removing blank ballots from the official ballot books, forging thereon the names of the election clerks and judges of the different precincts, marking the ballots for the Democratic candidates, and depositing them in the official ballot boxes with the intent that they be counted and recorded as lawful ballots (R. 4-5). It was also alleged that the defendants and others unknown to the grand jury in fact stuffed the ballot boxes in the manner contemplated by the conspiracy (R. 5-6).

Following a trial by jury, petitioner was found guilty (R. 492) and sentenced to two years' imprisonment (R. 493).[1] On appeal to the Court of Appeals for the Sixth Circuit, the judgment of conviction was affirmed (R. 501). The Government's evidence may be briefly summarized as follows:

At the general election of November 2, 1948, a total of two hundred fifty-four fraudulent ballots were placed in the ballot boxes of eleven of the 31 voting precincts in Bourbon County, Kentucky; all bore on their reverse sides the forged signatures of the election officers of the respective precincts.[2] The straight Democratic ticket was voted on all but

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[1] Funk was found not guilty (R. 492).

[2] See R. 62, 85, 92-93, 97-98, 100-102, 104, 115-116, 119-120, 126-127, 130, 134-136, 138-139, 141, 146, 151-152, 155, 157, 164-165, 167, 169, 173-174, 178-183, 186-189, 195, 200, 202, 205, 211, 217, 270-271.

one of the fraudulent ballots (Gov. Exs. 1, 2, 4, 6, 8, 10, 12, 15, 16, 20, 22), which was scratched.[3]

The ballot boxes for the 31 precincts were checked, locked, and placed in the hallway of the county courthouse in Paris, Kentucky, at about 4 p.m. on Saturday, October 30, 1948 (R. 53-54, 60, 71). The ballot books containing blank ballots were delivered by the printer ten days prior to the election and were kept in a large vault in the office of the clerk of the court (R. 72, 222, 224, 244, 247, 255). Every one who worked in the courthouse had a key to the clerk's office, but there were only two keys to the vault, one of which was kept by the clerk, and the other, by the deputy clerk (R. 74-75, 258). However, the County Attorney, William T. Baldwin, had frequent occasion to go into the vault at night and at other times when the clerk and deputy clerk were not present; accordingly, there was an arrangement whereby the clerk would leave her key to the vault in a hiding place in her office, known to Baldwin, so that the latter could have access to the vault when the clerk and deputy clerk were not around (R. 75-76).

The ballot boxes and blank ballots were distributed to the county precincts on Monday, November 1, 1948; those for the city precincts were distributed shortly prior to 6 a.m. on the following day, the day

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[3] The scratched ballot was cast for the Democratic candidate for President and the Republican candidate for United States Senator (R. 112).

of the election (R. 54-55, 234, 249-250). On Sunday morning, October 31, petitioner, Baldwin, one Dan Peed, and others were together at a restaurant in Paris (R. 432). Petitioner and Baldwin had been close friends for many years, "[s]ocially and politically" (R. 114). The courthouse janitor was in the courthouse on this Sunday, and he observed Peed about the courthouse door (R. 419).

Petitioner was an election officer of Clintonville Precinct No. 3, one of the eleven precincts at which fraudulent ballots were cast (R. 69, 97). It was at this precinct that the ballot fraud here involved was first discovered. S. H. Maddox, the Republican election judge at this precinct, in carrying the ballot box for this precinct into the precinct headquarters preparatory to the commencement of voting, heard a "rattle of paper" in the box, and told the other precinct officials present, including petitioner, that something was "wrong here" because "there's something in this box already" (R. 97). Petitioner displayed little concern, suggesting that they "go on [with] the voting," since "these ballots are numbered" (R. 93, 97). Maddox insisted, however, that there be no voting "until the box is clean" (R. 93). The county sheriff and other county officials were notified, and the presence of fictitious ballots in the box was discovered (R. 56-57, 98). This led to an investigation of the ballot boxes and official ballot books in the other precincts of the

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county,[4] and the discovery of the extent of the fraud (R. 270-271). Shortly after the discovery of the fraud in his precinct, petitioner left the precinct headquarters, and was seen a short while later talking to Baldwin at the courthouse in Paris (R. 59, 251).

Approximately a week after the election, petitioner approached Guthrie Crowe, the Kentucky State Police Commissioner, told him that in his opinion "the Republicans had stuffed these boxes," and asked whether Crowe "had been solicited in any fashion to enter into the investigation" (R. 329-330). Petitioner also discussed with Crowe "the question of whether or not fingerprints could be retained upon ballots" (R. 330).[5] He had with him "a small piece of ballot type paper," and requested that it be tested "to determine whether or not finger prints would be retained upon its surface" (*ibid.*). Tests were made, and petitioner was advised that no prints could be found on the paper and that "it would probably take a rather oily print to be retained" (R. 332). At a subsequent date, following the return of the instant indictment,

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[4] In each precinct affected by the election fraud, it was discovered that numbers of blank ballots were missing from the back portions of the ballot books (see, e.g., R. 132, 134, 137, 138, 141, 147, 150, 270-271).

[5] When the election commissioners examined the ballots on election night in an effort to separate the legal from the false ballots, they at first handled the ballots without gloves, but later started using gloves, for the evident purpose of injuring fingerprint evidence as little as possible (R. 63).

petitioner again approached Crowe and made inquiries about the possibility of fingerprints being discoverable on ballot-type paper (*ibid.*). Petitioner's friend Baldwin also called Crowe, on the same day as petitioner's first visit with the latter, and requested that some one "familiar with fingerprints" be sent to Paris "to look into this question of the stuffed boxes" (R. 331-332).

A handwriting expert employed by the F.B.I. testified that the forged signatures of election officers on 219 of the fraudulent ballots were in the handwriting of the codefendant Funk, petitioner's law partner (R. 379-380), but that he could not identify the handwriting on the remaining 35 ballots as being in the same handwriting (R. 303-324). However, a handwriting expert who testified as a witness for Funk testified that in his opinion the forged signatures on none of the 254 fictitious ballots was in Funk's handwriting (R. 410-412).

Judge William B. Ardery testified that at about 11 p.m. of November 7, 1948, the Sunday following the election, petitioner visited him at his home (R. 365) and (R. 366)—

> * * * told me that he and two other young men prepared the ballots here in issue and put them in the ballot boxes before the election began. * * * He gave me two details in regard to it. He said one of the young men wrote the names of the election officers on the ballots and that he stamped the ballot that scratched Sen-

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ator Chapman [see fn. 3, supra, p. 5]. Mr. Prichard was greatly disturbed, both mentally and emotionally. His mind was not on the past. It was on the future, at what it might hold for him. He asked me if I had a suggestion which would help him. I had none at that time.

ARGUMENT

1. Petitioner contends (Pet. 30-40) that his admission to Judge Ardery of complicity in the election fraud here in issue was made in connection with a *bona fide* request for legal advice from an attorney qualified to give such advice; that, accordingly, the admission was a privileged communication between client and attorney within the common-law principle making such communications, at the option of the client, inadmissible in evidence; and that it was therefore prejudicial error for the trial court to admit this evidence over his objection. We submit that the contention is without merit.

The relevant facts bearing on this issue, adduced at a hearing held in the jury's absence (see R. 340-355), are as follows:

Philip Ardery, Judge Ardery's son (R. 348) and a former law partner and lifelong friend of petitioner (R. 346, 347), testified that at about 9 p.m. on Sunday, November 7, 1948 (R. 347, 348, 351-352), petitioner called on him and asked him if he could ask "my advice about a matter of concern to him, and I told him that he could" (R.

347). After hearing petitioner's story, Philip drove petitioner to Judge Ardery's home, arriving at about 11 p.m. (R. 347-348). Philip could not recall whether it was he or petitioner who suggested the visit to Judge Ardery (R. 347). Though nothing was said at the time about the payment of a retainer or the contraction of a formal attorney-client relationship between Philip and petitioner, Philip understood that petitioner was seeking his "legal advice" (R. 350, 351).

Judge Ardery, who had known petitioner all his life, testified that he was Circuit Judge of the 14th Judicial District of Kentucky, which includes Bourbon County (R. 341); that he acted as the presiding judge of the court during its sessions immediately following the election in question (*ibid.*); and that he empaneled and instructed a grand jury "relative to the investigation of the purported election fraud" (R. 342). At about 11 p.m. on Sunday, November 7, 1948, he further testified, his son Philip, together with petitioner, called on him at his home in Paris (R. 342-343). This was the evening before the above-mentioned grand jury was due to be empaneled, and was in fact empaneled, "to hear the testimony in the election fraud" (R. 343). Petitioner was "an active practicing lawyer" in Judge Ardery's court, the latter further testified, and was well aware of the fact that he, Judge Ardery, was "the Circuit Judge of the district and of the county in which the matters that

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were to be presented to the Grand Jury were alleged to have occurred" (R. 344). Judge Ardery was then asked the following question by Judge Ford, the trial judge below (R. 344):

> Of course, you and he [petitioner] both knew and understood that you, being the Circuit Judge, could not stand in the relation of his counsel or his attorney in regard to any matter which might come before the Court.

Judge Ardery replied (R. 345):

> If your Honor please, I regarded it in the light of——
>
> (Reporter's Note: Sentence not completed by Judge Ardery. H. G. B.)
>
> I think you will have a better understanding of my position if I might say to you, Judge, if I could say it, when Mr. Prichard appeared at that door that night he said, "Judge, I am in deep trouble, and I want your advice." I invited him into my home.

Petitioner's counsel then asked (*ibid.*):

> You understood from that that it was legal advice, did you not, Judge?

Judge Ardery's reply was (*ibid.*):

> Senator, I thought I could give it to him, and if anything transpired later, I would not sit in the case.[6]

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[6] As previously indicated (*supra*, pp. 8-9), Judge Ardery later testified before the jury that petitioner, after admitting to him his complicity in the election fraud, asked him if he

Petitioner himself then gave the following version of the circumstances attending his interview with Judge Ardery:[7] Following his consultation with Philip Ardery (see *supra*, pp. 9-10), and at the latter's suggestion, they both drove to Judge Ardery's home because (R. 353)—

> We felt the need of further legal advice. I felt the need of further legal advice, and after consulting with Mr. Philip Ardery, I decided that I wanted to seek that legal advice from Judge Ardery.

Asked if he "believed in good faith to consult Judge Ardery was proper," petitioner replied (R. 353):

> I believe that while there might be some question as to the right of Judge Ardery to repre-

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had "a suggestion which would help him," but that he, Judge Ardery, on that occasion, told petitioner he "had none" (R. 366). Judge Ardery testified, however, that on the following Wednesday petitioner again asked him if he had "any suggestions" to offer, and that on that occasion he "made one suggestion and gave him one piece of advice" (*ibid.*). A brief hearing was then held, again in the jury's absence, to inquire into the evidential competency of what transpired between Judge Ardery and petitioner at this second meeting between them (R. 366-367). At this hearing, Judge Ardery testified (R. 367): "I suggested to him that he go to his pastor and talk over the matter he had told me of. He didn't seem inclined to receive that suggestion favorably, and then I told him that in my opinion the sooner he got this question over and disposed of, the better it would be. My Grand Jury was then in session.

"Q. Was there any further said to clarify just how the matter was to be disposed of? A. No, sir. We understood each other as to what my words meant."

Judge Ford decided that the "Wednesday conversation" "add[ed] nothing to the materiality of facts here presented," and ruled that it "be excluded from the jury" (R. 368).

[7] This was still in the jury's absence. Petitioner did not testify before the jury.

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sent me, at least in Circuit Court in any matter, I believed after studying the law to the best of my ability that he did have a right to give me legal advice as an attorney.

On cross-examination, petitioner testified as follows (R. 355):

Q. Do you believe that you could get objective legal advice, sound legal advice, competent legal advice from the Judge of the Court, who was about to investigate the very legal situation that you were consulting him about? A. Ever since I have known him, and that is since my childhood, I have believed that I could get sound competent legal advice from Judge Ardery upon any subject at any time.

Q. Did you think that in going to Judge Ardery that he could remain objective at any subsequent trial that might come up as the result of the grand jury investigation after you sought his advice? A. I felt that Judge Ardery would be disqualified in the event of any subsequent trial, because of his having given me legal advice.

Q. So that knowing that he would be disqualified at the time you went to him, you never the less went to him for legal advice? A. I felt—I asked his advice, his legal advice and he consented to give it to me.

Q. Even though it brought about a disqualifying situation at that time? A. That situation never arose. You asked me what I felt about it.

Following the above hearing, Judge Ford, in a memorandum opinion (R. 356-359), ruled that petitioner's communications to Philip Ardery were privileged and therefore inadmissible because made in connection with a *bona fide* attorney-and-client relationship (R. 356-357), but that his communications to Judge Ardery were not privileged because no such relationship ever came into being or was contemplated by either party (R. 357-359). Judge Ford's memorandum reads in part as follows (R. 358):

> Section 30.120 of the Kentucky Revised Statutes forbids all Circuit Judges from practicing law in any Court of the State except in cases in which they were employed previous to election to the office, or in which they are personally interested. This statute is obviously designed to safeguard the integrity of the Courts.
>
> The defendant Prichard was an active member of the bar of the Court over which Judge Ardery presided. He sought legal advice from Judge Ardery, but he does not claim that it was his purpose to create or establish the relation of attorney and client between them. It is quite clear that no such relationship existed or was contemplated by either of them. At the preliminary hearing, Mr. Prichard testified: "I felt that Judge Ardery would be disqualified in the event of any subsequent trial because of his having given me legal advice;" and

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> Judge Ardery testified: "I thought I could give it to him, and if anything transpired later, I would not sit in the case."
>
> I am of the opinion that one who seeks the advice of the Judge of the Court in which his case is to be tried, when it is apparent to him the giving of such advice by the Judge would disqualify him from sitting in the case, is not entitled to the privilege accorded by the law to confidential communications between an attorney and his client. To allow the privilege under such circumstances would invite frustration of the administration of the Courts by their duly elected and qualified Judges. Such application would seem inimical to the public interest and a pervasion (*sic*) of the purpose and spirit of the rule.

We submit that Judge Ford's ruling and the unanimous decision of the Court of Appeals affirming it (see R. 502-508) are clearly correct. As pointed out by the Court of Appeals (R. 505), one of the essential conditions for the successful invocation of the attorney-client confidential communication privilege is that the communication be made in connection with a request for legal advice "from a professional legal adviser in his capacity as such." See 8 Wigmore, *Evidence* (3d ed.), §§2292, 2300-2304. This condition was plainly not fulfilled here. It is not necessary to rely on Section

30.120(1) of the Kentucky Revised Statutes,[8] forbidding state circuit judges, such as Judge Ardery, to "practice law in any court of the state," in order to sustain the rulings below. For, as the Court of Appeals observed (R. 506)—

> The present case, however, is *sui generis.* Judge Ardery was not merely a judge giving, as a lawyer, legal advice to a client—he was the presiding circuit judge of Bourbon County and as such had impaneled a grand jury which he was about to instruct concerning reported infractions of law upon which his advice was sought. By all standards of ethical conduct which govern the conduct of a judge it was morally, if not legally, impossible for Judge Ardery to enter into an attorney-client relationship with one whose conduct was to be investigated by a grand jury already called and about to be instructed, and this Prichard knew or must have known. It is true that no indictment against Prichard was returned by the local grand jury, but this was because the Federal Bureau of Investigation had taken over the inquiry and the state grand jury investigation was never completed. Prichard testified *in camera* that he knew Judge Ardery would be disqualified in sitting upon his case if an indictment against him were returned. By all the modern concepts of judicial ethics, the

[8] This section provides in pertinent part: "* * * a judge of the Court of Appeals or circuit judge shall not practice law in any court of the state except in cases in which he was employed previous to his election, or in which he is personally interested." See R. 505.

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judge was not only disqualified from sitting on Prichard's case, but doubtless was also disqualified from organizing and instructing the grand jury once he was advised that the investigation would likely bring within the ambit of the inquest matters bearing upon the conduct of one who, upon the eve of inquiry, had already discussed with him participation in the very alleged unlawful conduct about to be investigated. * * *

Moreover, as the court below further remarked (R. 507-508),—

Finally, Prichard's request for advice was robbed of the element of good faith once he knew, as know he did, that the judge was about to charge a grand jury in respect to election frauds. Whether we conceive the function of the judge in organizing and instructing a grand jury to be judicial or administrative is immaterial. In either capacity, knowledge of law violation may not be reposed in him under the cloak of privilege. As Wigmore puts it, § 2300, "A consultation with a judge, in his capacity as such, falls unquestionably outside the present privilege." Judge Ardery was currently engaged in ferreting out election frauds under the authority and command of the laws of his state. Knowledge that came to him while exercising this function could not be received by him in confidence. Whether judges of superior courts may ever enter into an attorney-client relationship, we need not presently decide, even though voicing our doubts.

> It is sufficient to say for purpose of present decision, that a judge circumstanced as was Judge Ardery, may not enter into such relationship with a lawyer who may not deny knowledge of accepted notions of judicial propriety. * * *

For the foregoing reasons, it is immaterial, contrary to petitioner's suggestion (Pet. 34), that Judge Ford found that petitioner "sought legal advice from Judge Ardery" (see R. 358). Manifestly, the mere fact that a person seeks legal advice from another does not suffice to render communications made in connection therewith privileged. For, as pointed out both by Wigmore (vol. 8, § 2292) and the Court of Appeals (R. 505), the seeking of legal advice constitutes but one of the essential requirements for the invocation of privilege. And even with respect to this requirement, the legal advice must obviously be sought in good faith. The record fully supports the explicit finding of the Court of Appeals (R. 507-508), and the implicit finding of the District Court (see R. 358), that the latter element was lacking in the circumstances of this case.[9]

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[9] Petitioner cites 8 Wigmore, *Evidence* (3d ed.), § 2376(2), as authority for the statement that "a confidential disclosure made to a judge should be privileged, even though the judge, unlike Judge Ardery, has not consented to give legal advice" (Pet. 35). However, examination of the cited subsection discloses that Wigmore is there speaking of a privilege entirely distinct from the attorney-client privilege, *viz.*, the privilege that attaches to communications by informers to the Government (cf. § 2300 (2)). And, as Wigmore makes clear, the

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2. Petitioner contends (Pet. 19-30) that the jury's acquittal of the codefendant Funk necessitates the setting aside of his conviction because there is no evidence that he conspired "with any

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privilege there discussed is that of the judge, not of the person making the communication.

Petitioner cites *Bennett* v. *Commonwealth*, 234 Ky. 333, as holding that "even a prosecuting attorney may be barred by the attorney-client relationship from testifying about what a prisoner had told him in confidence" (Pet. 37). However, while the court mentioned the possibility of holding inadmissible, on this ground, the communication there involved (an offer by one accused of murder to "plead guilty and take life imprisonment"; see p. 336), the decision, holding the offer inadmissible, was actually based on an entirely different principle—the rule excluding offers in compromise (see pp. 337-339).

Petitioner also relies on *People* v. *Pratt*, 133 Mich. 125, as authority for his present contention (Pet. 35, 37). There, Pratt was convicted of paying money to a Michigan legislator with intent to influence his vote on certain pending legislation. The circuit judge who convened the grand jury which indicted Pratt was permitted to testify at the trial that Pratt came to him prior to being called before the grand jury to testify and asked him for "some advice"; that he, the judge, told Pratt that he could not give him any advice and that he should see an attorney; but that, notwithstanding, he did advise him that he was not obliged to testify to anything that might incriminate himself, though he was bound to tell the truth in respect of anything he should testify to. Pratt, thereupon, according to the judge, burst into tears and confessed his guilt of the offense for which he was subsequently indicted. A majority of the Supreme Court of Michigan, in a 3-to-2 decision, held that the admission of the judge's testimony was error, apparently on the ground that Pratt's confession followed the judge's giving of legal advice (despite his telling Pratt that he could not advise him). The decision is thus distinguishable from the case at bar, since Judge Ardery at no time undertook to advise petitioner legally, either before or after the latter confessed his guilt. Indeed, so far as appears from the record, petitioner told his story to Judge Ardery before the latter had any inkling that petitioner's visit had any connection with the election fraud. In any event, the dissenting opinion in the *Pratt* case (pp. 132-138) is, we submit, the better reasoned.

person other than Funk." This contention is also without merit. The indictment charged the two named defendants with conspiring with each other *and* with others to the grand jury unknown (*supra*, p. 3). The trial judge clearly instructed the jury that either of the named defendants could be convicted alone if the jury found that that defendant conspired with a person or persons other than the other defendant (R. 469, 471, 481). It was perfectly clear to the jury that petitioner conspired with at least two persons in the ballot box stuffing scheme, for petitioner admitted as much to Judge Ardery (*supra*, pp. 8-9). This admission, moreover, was fully corroborated by independent evidence. In the first place, the jury knew that some one other than petitioner had forged the election officers' names to the fictitious ballots. The Government contended that that other person was Funk, and adduced the testimony of a handwriting expert to substantiate its contention. The testimony of another handwriting expert, however, contradicted that of the Government's expert witness (*supra*, p.8), and this conflict in the testimony, together with Funk's assertion of his innocence on the stand (R. 382-383), evidently engendered a reasonable doubt in the jurors' minds as to Funk's guilt. Because of this doubt, they were, of course, required to acquit Funk, under the correct instructions of the court (see R. 466-467). But their doubt as to Funk's identity as the forger of the ballots

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plainly did not affect their belief, based on the uncontradicted evidence, that *some one* other than petitioner forged them. In addition, the jury had before them the evidence tending to link petitioner's friend Baldwin (*supra,* pp. 5, 6, 7, 8), and possibly others (see *supra,* p. 6), as parties to the scheme. This evidence likewise tended to corroborate petitioner's admission that at least two other persons engaged in the joint enterprise with him. It was, of course, unnecessary for the jury to determine precisely who these other persons were, since none of them, with the exception of Funk, as to whom they had at least a reasonable doubt, was on trial. The guilt of petitioner had been demonstrated to the jury beyond a reasonable doubt, and that, under the correct instructions, was all that was required to convict him.

3. Petitioner contends (Pet. 40-42), relying on a single sentence occurring near the end of the trial court's instructions—"You may find one of [the defendants] guilty and the other not guilty" (R. 481),—that the jury may have been left with the impression that they were at liberty to convict one and acquit the other of the two defendants without it being necessary that the verdict as to the convicted defendant be based on evidence that he conspired with "persons unknown." The contention is insubstantial. The sentence relied on, when read, as of course it must be, in the context of the instructions as a whole, could have left no

such erroneous impression. Earlier in the charge, the trial judge instructed the jury with care and precision in respect of just what they must find in order to convict (1) both defendants or (2) either singly (R. 469-470, 471), and made it very clear that a person cannot "conspire" with himself (R. 469-470). These instructions are plainly correct and petitioner does not challenge them. Even in the more limited context in which the presently criticized sentence appears—the two full paragraphs appearing at R. 481—the sentence is not misleading. The final two sentences of the second of these paragraphs—"You may find one of them guilty and the other not guilty. You may find them both guilty or you may find them both not guilty under the charge here"—constituted merely a terse summing-up of the detailed instructions on this point that had previously been given. There plainly was no danger that the jury might have received the erroneous impression which petitioner now suggests. It is significant that counsel for petitioner did not raise the present point at the time of the instructions (see R. 482-485), when whatever deficiency there may have been in the instructions in this respect—we think, however, for the reasons stated, that there was no deficiency—could have been corrected on the spot by the court. See Rule 30, F. R. Crim. P.

4. Petitioner's argument (Pet. 6-19) that the indictment failed to charge, and the proof to

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establish, an offense under 18 U.S.C. 241 (*supra*, p. 2) does not, we think, merit extended discussion. It is settled that a conspiracy to stuff ballot boxes at an election in which federal officers are voted for is a violation of this statute. *United States* v. *Saylor*, 322 U. S. 385. See also *United States* v. *Classic*, 313 U. S. 299; *United States* v. *Mosley*, 238 U. S. 383. *United States* v. *Bathgate*, 246 U. S. 220, relied on by petitioner (Pet. 14-17), was limited to its facts (conspiracy to bribe voters at a general election) by the *Saylor* decision, 322 U. S. at 388-390. Petitioner's suggestion that whether or not the particular ballot box stuffing scheme in question violates the statute depends on such considerations as the number of fictitious votes cast, the largeness of the enterprise, and the degree of probability that the fraud contemplated and perpetrated will "swing" the election (Pet. 8-12, 16-18) finds no support in the controlling decisions, *supra*, and is, moreover, we submit, without rational foundation.

CONCLUSION

The judgment below is correct, and no conflict of decisions or question meriting further review by this Court is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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